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No. _____

In The
Supreme Court of the United States

JENNIFER NEAL, personal representative of the estate of deceased Willie Neal, Jr.; JENNIFER NEAL, on her own behalf,
Petitioners,

v.

ST. LOUIS COUNTY BOARD OF POLICE COMMISSIONERS; ST. LOUIS COUNTY POLICE DEPARTMENT; RONALD BATTELLE, Chief of St. Louis County Police Department; ROBERT FLAGG, Chairman; GENE WARMANN, Vice Chairman; PATRICK PWARDOWSKI, secretary; SHEILA HOFFMEISTER, member; LEON BURKE, member, comprising the St. Louis County Board of Police Commissioners; CARL PETERSON,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When a petitioner alleges that a police officer violates his department's policies and exhibits behavior over a period of time that shows a disregard for human life in the planning and execution of an undercover narcotic sting operation which results in the death a fellow officer, is there an actionable claim for deliberate indifference or recklessness in violation of the deceased's and his family's rights to due process under 42 U.S.C. § 1983?

PARTIES TO THE PROCEEDING

Petitioners

Jennifer Neal, personal representative of the estate of deceased Willie Neal, Jr., Jennifer Neal, on her own behalf. Petitioners are individuals and have no corporate affiliations. In addition to the Petitioners stated in the caption, Willie Neal, Sr., Jamelah Neal and Whitney Neal, by their next of friend, Jennifer Neal, were parties before the court of appeals.

Respondents

St. Louis County Board of Police Commissioners; St. Louis County Police Department; Ronald Battelle, Chief of St. Louis County Police Department; Robert Flagg, Chairman; Gene Warmann, Vice Chairman; Patrick Pwardowski, secretary; Sheila Hoffmeister, member; Leon Burke, member, comprising the St. Louis County Board of Police Commissioners; Carl Peterson.

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Petitioners, Jennifer Neal, personal representative of the estate of the deceased, Willie Neal, Jr., and Jennifer Neal, on her own behalf, respectfully request that writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at Neal v. St. Louis County Bd. of Police Commissioners, 217 F.3d 955 (8th Cir. 2000). The opinion of the district court is reported at Neal v. St. Louis County, 52 F.Supp.2d 1090 (E.D.Mo. 1999).

STATEMENT OF JURISDICTION

The judgement of the United States Court of Appeals for the 8th Circuit ("Court of Appeals") was entered on July 3, 2000 (App. A at 1a). The Court of Appeals denied a timely petition for rehearing on August 10, 2000 (App. B at 13a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the United States Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

Federal law, under 42 U.S.C. § 1983 states in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

The fundamental question in this case is whether a police officer's actions in relation to an undercover drug buy operation over a period of several hours, during which the officer exhibits blatant ignorance to departmental standards and policies designed and adopted exclusively for safety purposes, amount to deliberately indifferent conduct constituting actionable deprivation of his fellow officer's due process rights where the officer ultimately shoots and kills his fellow officer during the operation.

A. Nature of the Case.

This case involves Petitioners' civil action for damages stemming from the homicide of Willie Neal, Jr., a former undercover detective in the Bureau of Drug Enforcement Multi-Jurisdictional Task Force (Task Force) for the St. Louis County Police Department (Department). On January 29, 1997, Neal was killed in the line of duty after being shot with a single bullet from Respondent Carl Peterson's weapon during an undercover "drug buy."

On January 30, 1998, Petitioners filed a petition against Respondents in the United States District Court of Missouri, Eastern District. On April 21, 1998, Petitioners filed their first amended complaint, which, pursuant to 42 U.S.C. §§ 1983 and 1988, alleged that Peterson, acting alone and in concert with others, wrongfully caused the death of Neal in violation of the constitutional rights of Neal and his surviving family. The complaint additionally alleged that the remaining municipal Respondents were liable for damages resulting from Neal's death because they failed on a continuing basis to train, instruct, supervise, control and discipline officers of the Department, including Peterson, and

that this failure was a result of the official policy, custom and practice of the County, and that this conduct caused the deprivation of the constitutional rights of Neal and his surviving family.

Specifically, the amended complaint charged the following. In Count I, Jennifer Neal, as the personal representative of the estate of Willie Neal, Jr., alleged that Peterson, through conscious disregard, deliberate indifference, recklessness, and use of excessive force, in firing his weapon caused the wrongful death of Neal, thereby depriving Neal of his rights secured by the Fourth and Fourteenth Amendments of the United States Constitution. In Count II, Jennifer Neal, again as the personal representative of the estate of Willie Neal, Jr., alleged: (1) that at the time of Neal's homicide there existed, within the Department, policies, customs, practices and usages so pervasive that they constituted the policy of St. Louis County; (2) the Board and Respondent Ronald Battelle were responsible for the adequate training, supervision, control and discipline of the employees, agents and servants of the Department; (3) the Board and Battelle knew or should have known that the policies, customs and practices existing in the operation of the Department's Drug Task Force Unit (Unit) prior to Neal's death created an unreasonable risk of harm to Neal; (4) all municipal Respondents[1] showed a conscious disregard and deliberate indifference to the safety of Department officers through the policies, customs and practices of the Unit which caused the death of Neal; (5) the municipal Respondents failure to train, supervise and control its employees, including Peterson,

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[1] As used hereafter in this brief, "municipal Respondents" is composed of all named Respondents, except for Carl Peterson.

constituted a deliberate indifference to Neal's safety;[2] and (6) the municipal Respondents engaged in the above-described conduct which constituted a conscious disregard and deliberate indifference that caused the death of Neal and deprived him and Jennifer Neal of their rights under the Fourth and Fourteenth Amendments.

Counts III through X of the amended petition stated claims on behalf of Jennifer Neal, Willie, Sr., Jamelah and Whitney Neal, alleging that the death of Neal deprived them of a their familial relationships with and companionship, guidance, care, comfort and support from Neal, in violation of their due process rights secured by the Fourteenth

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[2] This Count contained eight more specific charges that the municipal Respondents failed to: (1) train members of the Unit in procedures and safety measures for undercover "drug buys" and related field activities; (2) provide Unit members with consistent, current or comprehensive written procedures or protocols for undercover drug buys and related field operations; (3) provide Unit members with pre-operational planning, briefing or coordination for undercover drug buys similar to the one in which Neal was killed; (4) have a supervisor at the scene or coordinating drug buys or providing back up officers for such drug buys; (5) to recruit, assign and maintain a minimally adequate number of Unit officers to avoid increasing the risk of injury of officers working alone or by pairing such officers with officers with little or no experience of carrying out undercover drug buys; (6) require use of microphones or recording devices during undercover transactions; (7) conduct debriefings with Unit officers involved in undercover operations; and (8) monitor the emotional well-being of its officers, including the failure to require medical or psychological intervention after injuries or extraordinary incidents occurring in the line of duty.

Amendment.[3] Count XI alleged that under §§ 537.080 and 537.090, RSMo. 1994, Peterson caused the wrongful death of Neal through his conscious disregard for and deliberate indifference to the safety of Neal and his reckless failure to exercise a high degree of care in discharging his weapon. Peterson's actions, as alleged by Petitioners, caused Neal pain and suffering and caused Petitioners the loss of the companionship, comfort, instruction, guidance, counsel, training and support of Neal.

B. Background Facts to Petitioners' Claims.

On January 29, 1997, Willie Neal , Jr., served as a St. Louis County Police Officer in the Department's Bureau of Drug Enforcement Multi-Jurisdictional Task Force (Task Force). At this time, Neal was under the direct supervision of Detective Sergeant Perez and Commander Lieutenant Edward Clayton. He was the only Afro-American member of the Task Force. The Bureau of Drug Enforcement (BDE):

> ". . . is charged with the responsibility for investigation of offenses which are violations of local, state and federal statutes.
>
> The [BDE] will actively seek out drug traffickers at all levels and bring charges against them. The [BDE] will file asset seizure cases against drug traffickers whenever possible and will be responsible for coordinating and filing all asset seizure cases made throughout the Department.

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[3] Two counts were included for each Petitioner which mirrored the allegations of Counts I and II.

> The [BDE] will cooperate with other law enforcement agencies in order to provide for the effective investigation of drug related cases.
>
> The primary consideration of any drug investigation or arrest should and will be OFFICER SAFETY."

The following units fell under the supervision and control of the BDE commander and assistant commander: (1) DEA Task Force; (2) Undercover Unit; (3) Bureau of Special Investigations; (4) Street Enforcement Team; and (5) Grant Coordinator. As Neal served as an undercover detective, he worked in the "Undercover Unit" referenced above. On January 29, 1997, Peterson was a St. Louis County Police Officer who served in the "Bureau of Special Investigations," which enforced laws against vice. Peterson was not Neal's partner, and Neal had no assigned partner at this time. Peterson, however, occasionally assisted members of the Task Force on drug buys.

At 2:00 p.m. on January 29, 1997, Neal spoke with Sergeant Ken Cox, indicating that he was attempting to set up a drug purchase from Collis Lee. Neal had made a previous drug purchase from Lee on January 23, 1997, and at that time was assisted by his supervisor and three undercover police officers. Cox told Neal he was on his way to a meeting and instructed Neal to call him if he was able to set up the drug buy. At 2:30 p.m., Neal approached Peterson, told him that he had set up a pending, undercover drug buy and asked Peterson to assist him in the deal. Peterson "assumed" Neal had obtained the approval of Neal's supervisor to carry out the drug buy and agreed to assist Neal; but, he told Neal he needed to get the approval of his supervisor, Detective Bill

Hines. Neal spoke with Hines, explaining that he had set up an undercover purchase of marijuana on Natural Bridge in St. Louis County and needed assistance in carrying out the deal. Hines asked Neal if he needed any additional backup assistance, and Neal stated this was unnecessary. Neal did not mention the name of the suspect, and neither Hines nor Peterson requested such information. Hines then permitted Peterson to assist Hines in carrying out the proposed deal.

Neal drove in his undercover vehicle with Peterson sitting in the front passenger seat to a restaurant on Natural Bridge in Pine Lawn, Missouri, near the St. Louis County-St. Louis City boundary line. They were unable to locate the suspect. They sat in the vehicle for a while, and Neal then exited the vehicle and made a telephone call. Returning to the car, he advised Peterson that the suspect frequented a nearby liquor store, located east of the restaurant. At 3:15 p.m., Neal drove to Mac's Liquor Store on Natural Bridge within the City of St. Louis. He parked the vehicle facing east near the west side of the store at a right angle to that side of the store. At approximately 3:45 p.m., Peterson and Neal observed a man — later identified as Jerome Baker — walk from behind the store and approach the vehicle on the passenger side, where Peterson was sitting. Baker looked inside the vehicle at Peterson and Neal and then walked to the rear of the vehicle. Neal exited the car and met the suspect behind the car. They shook hands and began talking. Peterson never heard any of the conversation, as he remained seated in the front passenger seat of the car with the windows rolled up. Neal and Baker then walked around the vehicle to the rear of the store.

As Peterson was looking at the rear of the building where Neal and the subject had walked, Neal was almost

completely out of his sight.[4] Peterson then saw Neal's left hand start to rise slowly, giving Peterson the impression that Neal was in some type of trouble and was perhaps being robbed by Baker. Peterson exited the vehicle, drew his firearm and walked away from the side of the wall toward the rear of the store building. He observed Baker pointing a gun at Neal's head as Neal slowly lay on the ground in a prone position. Peterson identified himself as a police officer and told Baker to drop his weapon. Baker turned toward Peterson and fired several shots in his direction. Peterson fired several shots at Baker and then moved to the side of the building for cover. Baker then fled the scene.

Neal approached Peterson. Noticing that Neal had been injured, Peterson assisted him back to the vehicle, requested that nearby witnesses contact the authorities for assistance, and administered CPR to Neal. Emergency Medical Services personnel also arrived at the scene, examined Neal and found him to be lifeless at 4:02 p.m.

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[4] Conflicting evidence was presented to the district court on this factual issue. Peterson stated in his affidavit and the "Report of the Critical Incident Review Panel Concerning the Death of Detective Willie Neal, Jr., June 16, 1997" stated that Peterson lost sight of Neal except for his left side and left arm. However, Complaint No. 9701287, a St. Louis Metropolitan Police Department incident report relating to Neal's death, stated that Neal, in his interview with Homicide Detectives Right and Douglas, told them that Neal and Baker "walked around the auto to the rear of the building, out of his sight." Additionally, on April 3, 1998, Peterson stated to Neal's wife, Jennifer, in a conference room in the St. Louis City Municipal Court Building, provided by Assistant Circuit Attorney Dwight Warren, that he let Neal out of his sight and became alarmed when he could not see him.

The St. Louis Medical Examiner determined that Neal died due to a single bullet wound which entered the left side of his chest, traveled through both of his lungs and through his upper right arm. The bullet that struck Neal was fired from Peterson's pistol. At the time of the incident, Peterson did not realize he had shot Neal, he did not believe Neal would be endangered by the shots he fired as he only shot once Baker had fired at him and was in an erect position, and he did not intend to shoot or harm Neal. Neal additionally did not think he had shot Baker, his intended target. At the time of the incident, Neal was armed with a Department-issued, .40 caliber pistol which was in his waistband. He was not wearing any type of recording equipment or a bullet-proof vest.

Respondents offered the affidavits of Sergeant Michael Dierkes, a supervisor for the BDE, and Sergeant John Samson, the training supervisor of the St. Louis County and Municipal Police Academy. Both Dierkes and Samson reviewed and opined as to the quality of all of the training received by Neal and Peterson. Both found that Neal and Peterson had taken a number of academic courses concerning constitutional law, survival and safety tactics, defensive tactics, suspect confrontations, firearms training and procedures, and officer safety in undercover drug buy situations. Dierkes concluded that both Neal and Peterson received training which "informed, trained and practiced them in the knowledge and skills, including safety procedures, needed to face the situations they would likely experience during undercover drug buys." Samson concluded that both officers had qualified five times per year with the handguns they carried.

Petitioners offered evidence disputing the findings of Dierkes. Michael M. Cosgrove, Ph.D — an expert retained

by Petitioners, who served at all levels of the Miami Police Department, has a Doctor of Philosophy degree in criminal justice, and has taken a number of courses involving use of force and deadly force by police officers, authored and co-authored books an articles on police application of deadly force and the quality of training received by police officer, and who has worked undercover narcotics operations, buying narcotics and making narcotics-related arrests— stated in an affidavit that he reviewed the same training material packets of Neal and Peterson, as did Dierkes. Cosgrove concluded the training was "woefully inadequate" as the courses taken by Neal and Peterson were never followed up with field, in-service or hands-on training to insure adequate and proper implementation in the field of the procedures and practices taught in the courses. Petitioners additionally offered the affidavits of Mario Doss, a police officer for the City of Richmond Heights who worked in the Task Unit from May 1996 to January 1997 as Neal's partner, and Michael Reese, a former Department police officer who worked in the undercover unit of the BDE, making undercover drug buys. Both Doss and Reese stated they received no field or in-service training concerning carrying out undercover drug buys which was needed to insure the safety of undercover officers carrying out the buys.

The following evidence was offered to the district court regarding the policies of the BDE. The Critical Incident Review Panel highlighted the following material and relevant policies and procedures contained in the BDE's comprehensive procedure manual: (1) the BDE Mission Statement indicated that the primary consideration of any drug investigation or arrest was officer safety; (2) the BDE commander was to inspect the day-to-day operations of the BDE to insure that the Department and each of its division's policies were being followed, and that the commander had to

insure that the facilities and equipment of the BDE were properly maintained and that all personnel practiced safe work habits; (3) the BDE supervisors were charged with monitoring the progress of all covert and overt investigations being conducted by the undercover unit; and (4) detectives in the undercover unit had to keep their supervisors informed of the progress of all investigations, verify all information in their reports, and before initiating any undercover investigation they had to review the investigation with their supervisors. The procedures for undercover investigations included: (1) the primary concern was to be for officer safety; (2) the BDE supervisors were to be briefed and advised before any drug purchase; (3) all BDE detectives had to conduct thorough pre-purchase briefings to insure optimal officer safety; (4) all telephone conversations with suspects were to be recorded; (5) during all drug purchases, body microphones were to be used "without fail"; (6) lines of communication were to be established with surveillance detectives, including safety checks, signals and emergency contingencies; and (7) surveillance detectives were to be thoroughly briefed. Finally, the Review Panel found that the "procedure manual is not dated, nor is there a record of when it was distributed to the officers assigned to the Bureau of Drug Enforcement."

The Review Panel found the following to be the actual operational practices of the undercover unit of the BDE: (1) detectives routinely participated in undercover drug transactions without wearing body microphones, recording equipment or bullet-proof vests; (2) detectives frequently conducted drug transactions with only one assisting surveillance detective; (3) pre-buy briefings with supervisors were generally informal and did not include the mandatory completion of a "Pre-Operational Planning Information Sheet"; (4) detectives did not record all phone conversations with suspects; (5) police reports did not always accurately

reflect all surveillance detectives or supervisors at the scene or that body microphones were worn; (6) detectives had received training in undercover investigative techniques, officer safety and firearms training; (7) detectives carrying out undercover investigations normally notified the St. Louis Metropolitan Police Department and requested their assistance; (8) within the undercover unit, there were 14 assigned officers, with only one being Afro-American — Neal; (9) the Commander of the Bureau was "perceived by some members of the [undercover] unit as being insensitive to their concerns; (10) informal debriefings were conducted after undercover transactions, but the surveillance detectives were usually not included; (11) detectives did not use body microphones or recording equipment frequently because the equipment was thought to be unreliable; and (12) supervisors were not on the scene of most undercover drug transactions. The Panel finally found that a series of policies were violated in the undercover operation during which Neal was killed. The Panel found that undercover officers: (1) failed to notify supervisors of the planned drug buy; (2) failed to wear recording equipment; (3) failed to record phone conversations with suspects; (4) failed to accurately prepare investigative reports and inaccurately reported the location of three drug transactions; (5) failed to adequately prepare for the undercover transaction; and (6) failed to notify supervisors and the St. Louis Metropolitan Police Department when conducting undercover activities in the City of St. Louis. Finally, the Panel found that command and supervisory personnel failed to ensure consistent adherence to the policies of the BDE.

The deposition testimony of Edward Clayton, who was the Lieutenant in command of the BDE in January 1997, confirmed the Review Panel's findings. Clayton testified that he knew undercover drug buys were being made without any

type of recording devices or microphones being worn by the officers and without a supervisor present during the transactions, in violation of the BDE's policies. Clayton further testified that during undercover drug buys, the officers should have body microphones, there should be adequate backup for the operation, and pre-operational planning should be completed, all of which were not followed in the undercover operation which resulted in Neal's death. Clayton also testified that BDE supervisors were not briefed and advised prior to Neal's attempted drug purchase on January 29, 1997. Clayton additionally admitted it was the supervisor's ultimate responsibility to insure that the guidelines of the BDE's procedure manual were followed.

Cosgrove, in an affidavit, also confirmed the Review Panel's conclusions that the BDE's commander, supervisors and detectives, including Peterson, violated a number of the BDE's and undercover unit's policies and procedures, both in the January 29, 1997, incident and for an ongoing period of time prior to the incident. Cosgrove additionally concluded that Peterson was woefully unprepared to participate in the undercover operation and that such recklessness and deliberate indifference compromised the safety of Neal. Particularly, Cosgrove found that Peterson did not know the identity of the suspect and engaged in absolutely no planning with Neal prior to attempting to carry out the operation. Moreover, Peterson deviated from the BDE's training curriculum pertaining to responding to deadly force decision-making and hands-on application by failing to first seek cover and only then expose the muzzle of his weapon. Rather, Peterson exposed himself to confront the suspect, returned fire on the suspect and then sought cover. This course of activity unreasonably endangered his and Neal's lives. Finally, Cosgrove found that Peterson, who had taken the course "Mental Preparation for Armed Confrontations," ignored the curriculum which

pointed out that sometimes it is best to call off a buy, rather than move forward, especially when conditions are not favorable for the safety of the officer attempting to make the buy. Cosgrove concluded:

> "This is certainly applicable to this case, especially when considering that absolutely no pre-planning or pre-briefing took place, no supervision was on the scene, only one cover officer was present, the cover officer did not have any specific assignment, the buy location was not thought through in terms of its tactical considerations, the suspect was not known by the cover officer, the undercover officer was not wired or wearing a bullet-resistant vest, the tactical scenario did not lend itself for the cover officer to devote full attention to the suspect through a position of observation and control, and was not in a position to watch the suspect's hands due to losing observation of the suspect."

C. The Proceedings Below.

On May 1, 1998, Respondents filed a motion to partially dismiss Petitioners' petition, specifically Counts III through XI. Petitioners filed a responsive motion on May 20, 1998, (App. at 6) to which Respondents filed a reply on June 12, 1998. On May 29, 1998, the district court entered a case management order, requiring that all discovery be completed and all dispositive motions be filed by February 1, 1999. The court extended this deadline to April 30, 1999, in an order entered on April 17, 1999. The municipal Respondents filed notice of its motion for partial summary judgment on February 1, 1999, contending that they were seeking

summary judgment on all of Petitioners' claims because Peterson did not violate any of Appellants' federally protected rights, they did not fail to train or supervise Peterson, and they were protected from suit through the doctrine of qualified official immunity. Peterson also filed notice of his motion for partial summary judgment on February 1, 1999, asserting the same contentions as those listed above for the municipal officials as well as the allegation that he was shielded from liability for Petitioners' state claim of wrongful death under Missouri's public duty and official immunity doctrines. Petitioners filed responses to these motions and Respondents filed reply briefs.

On March 26, 1999, the district court entered an order and memorandum granting Respondents' motion to partially dismiss Counts III — XI of their amended complaint. The court essentially found that under the circumstances presented in Petitioner's claims — a police officer fired his weapon at a fleeing suspect and inadvertently shot and killed his fellow officer — an allegation of deliberate indifference or recklessness could not be the basis of Petitioner's substantive due process violation claims. In reliance on County of Sacramento v. Lewis, 523 U.S. 833 (1998), the district court found that only a purpose to cause harm unrelated to the legitimate objective of making an arrest will satisfy the element of arbitrary conduct that shocks the conscious which is necessary for a due process violation. Because Petitioners had not alleged that Peterson in any way intended to harm Neal during the shooting, they failed to state a cognizable claim upon which relief could be granted. The court additionally dismissed Petitioners' § 1983 claims, under the failure to train or the municipal custom and policy theories. Relying on Abbott v. City of Crocker, 30 F.3d 994, 998 (8th Cir. 1994), the court found that in order to hold a municipality liable under § 1983 on Petitioners' theories,

"there must first be a violation of the plaintiff's constitutional rights by the municipal employee (for whom the municipality is presumably liable)." Because the court found that Petitioners' failed to state a cause of action against Peterson for violation of its constitutional rights, the court consequently found that Petitioners failed to state a claim for relief against the remaining Respondents. Finally, the court addressed Petitioners' pendant state wrongful death claim against Peterson. Relying principally on Green v. Denison, 738 S.W.2d 861)(Mo.banc 1987), the court found that Peterson's decision to fire his weapon at a suspected drug dealer fleeing the scene is a clearly discretionary act — as opposed to a ministerial function — which accordingly afforded him immunity from suit under the state doctrine of official immunity.

On June 9, 1999, the district court entered an order and memorandum granting Respondents' motions for partial summary judgment. Neal v. St. Louis County, 52 F.Supp. 1090, 1096 (E.D.Mo. 1999). The court additionally entered a judgment in favor of Respondents. Id. The court directed its order at Counts I and II of the amended complaint — the only remaining counts of the complaint. The only difference between Counts I and II and those of III — X were that Counts I and II were brought only by Jennifer as the personal representative of Neal's estate, they sought relief for deprivations of her Fourth Amendment rights in addition to substantive due process claims and they sought compensatory and punitive damages for the alleged constitutional deprivations and no relief for loss of Neal's companionship and society. Id. at 1090.

The court issued three distinct rulings. First, the court found that the claim that Respondents violated Neal's Fourth Amendment rights were without merit. Id. at 1092-

93. On appeal, Petitioners agreed with this particular portion of the court's decision, as it comports both with *dicta* in County of Sacramento v. Lewis, 523 U.S. 833, 842-844 (1998)(finding that governmentally caused termination of an individual's freedom of movement amounts to a "seizure" under Fourth Amendment only when carried out through means intentionally applied) and the well-established law relied on by the district court. Neal, 52 F.Supp. at 1092-93. The court's other bases for granting summary judgment mirrored those set forth above on Respondent's motion for dismissal of portions of the complaint — failure to allege or prove that Peterson intentionally harmed Neal thereby exhibiting conscience-shocking behavior in violation of Neal's and Petitioner's constitutional rights and thus failure to provide requisite proof to prevail on Petitioners' claims against the municipal Respondents. Id. at 1093-96. The court additionally rejected Petitioners reliance upon Fagan v. City of Vineland, 22 F.3d 1283 (3rd Cir. 1994) for the proposition that the municipal Respondents could still be held liable for Petitioners' § 1983 claim based on the deliberate indifference standard of liability, regardless of whether Peterson violated Neal's constitutional rights. Neal, 52 F.Supp. at 1096.

The Eighth Circuit Court of Appeals denied Petitioners' appeal, affirming the district court's entry of a partial dismissal order and a partial summary judgment. Neal v. St. Louis County Bd. of Police Commissioners, 217 F.3d 955 (8th Cir. 2000). The appellate court essentially rubber-stamped the district court's rulings, agreeing that because of the rapidly-evolving events surrounding the actual shooting, Petitioners could only properly state a cause of action and succeed past the point of summary judgment by pleading and proving that Peterson acted maliciously and sadistically for

the very purpose of causing harm to Neal, thereby "shocking the conscience" with his conduct. Id.

The appellate court did address Petitioner's claim that Peterson's conduct over the course of the hour and a half prior to the shooting gave him considerable time to deliberate regarding his and Neal's failure to follow a number of Department policies and guidelines designed for officer safety and call off the buy. Id. at 958-59. The court ultimately concluded that:

> "it is inappropriate to look outside the time period immediately preceding Peterson's decision to fire his gun to determine whether Peterson's conduct was truly conscience shocking. More specifically, we refuse to consider violations of departmental guidelines allegedly committed approximately one and a half hours before the shootout between Baker and Peterson. Police department guidelines and policies do not create constitutional rights under the substantive due process clause of the Fourteenth Amendment. See Edwards v. Baer, 863 F.2d 606, 608 (8th Cir. 1989); see also Lewis, 523 U.S. at 855, 118 S.Ct. at 1721 (holding that '[r]egardless whether [defendant's] behavior offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, it does not shock the conscience, and [defendant's] are not called upon to answer for it under § 1983.'" Neal, 217 F.3d at 959.

The court additionally affirmed the district court's ruling that because Peterson did not violate Neal's Fourteenth Amendment right, the municipal Respondents could not be liable for failure to train or supervise Peterson. Id. Petitioners' request for a rehearing was denied on August 10, 2000. (App. B)

The import of the lower courts' decisions are clear. In refusing to recognize that Petitioners stated an actionable claim of due process deprivations and had provided sufficient proof to survive summary judgment, the appellate court implies that it does not matter what happens in the critical hours before an extremely dangerous undercover police operation nor does it matter that the specific officer in question exhibited a pattern of gross and deliberate indifference to his fellow officer's safety during this entire hour and a half period leading to the actual undercover buy attempt and ultimate shooting. Rather, according to the court of appeals, we need only be concerned with what happens at the exact moment of the taking of an innocent's life in determining whether a substantive due process claim exists.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULING IN COUNTY OF SACRAMENTO V. LEWIS, 523 U.S. 833 (1998) REGARDING THE APPLICATION OF THE DELIBERATE INDIFFERENCE STANDARD TO GOVERNMENT ACTION IN A SUBSTANTIVE DUE PROCESS VIOLATION CLAIM.

The petition for writ of certiorari should be granted because the opinion below conflicts with this Court's important prior ruling in County of Sacramento v. Lewis, 523 U.S. 833 (1998), regarding the requisite elements of liability in applying the deliberate indifference standard to a substantive due process violation claim.

To sustain a 42 U.S.C. § 1983 (§ 1983) civil rights action, a plaintiff must show "(1) that the conduct complained of was committed by a person acting under color of state law; and (2) that [such] conduct deprived the plaintiff of a federal constitutional or statutory right." Wood v. Ostrander, 879 F.2d 583, 587 (9th Cir. 1989). Here, it is undisputed that Peterson was acting under color of state law. At issue therefore is whether Peterson engaged in conduct that deprived Neal and Neal's family of their Fourteenth Amendment substantive due process rights. The Fourteenth Amendment provides, in part, that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "The touchstone of due process is protection of the individual against arbitrary action of government," Wolff v. McDonnell, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935 (1974), which has been interpreted to mean the exercise of power without any reasonable justification in the service of a legitimate government objective. *See, e.g.*, Daniels v. Williams, 474 U.S. 327, 331,106 S.Ct. 662, 664, 108 L.Ed.2d 100 (1986)(the substantive due process guarantee protects against government power arbitrarily and oppressively exercised).

Because the appellate court relied almost exclusively on Lewis in affirming the grant of Respondents' partial motion to dismiss and partial motions for summary judgment, the Lewis opinion must be closely examined to correctly apply it to the case at bar. In Lewis, the parents of a motorcycle

passenger killed in a high-speed chase of the motorcycle driver brought a § 1983 claim against Sacramento County, the sheriff's department and a sheriff's deputy — James Everett Smith — whose vehicle struck and killed the passenger, alleging deprivation of their son's substantive due process right to life. Lewis, 523 U.S. at 837. The parents alleged that Smith's action in chasing the motorcycle and striking their son exhibited a "conscious disregard" for his substantive due process right to life. Id. at 837-38. The Court interpreted this claimed standard to parallel an allegation of "deliberate indifference." Id. at 838-39.

In the opinion, this Court noted that with a § 1983 substantive due process challenge to abusive executive action, "only the most egregious official conduct can be said to be 'arbitrary in the constitutional sense' . . . ." Id. at 845. From this principle, this Court adopted a "shocks the conscience" standard for establishing a due process violation in § 1983. Id. at 846-47. In explaining the contours of this standard, this Court declared:

> "But when unforeseen circumstances demand [a police] officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates 'the large concerns of the governors and the governed.' Daniels v. Williams, 474 U.S., at 332, 106 S.Ct., at 665. Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for Due Process liability in a pursuit case. Accordingly, we hold that high-speed chases with no intent to harm suspects physically or worsen their legal plight do not give rise to liability under the

Fourteenth Amendment, redressible by an action under § 1983. Lewis, 523 U.S. at 853-54.

Applying this pronouncement of law to the facts of the case at hand, this Court specifically held:

> "Smith was faced with a course of lawless behavior for which the police were not to blame. They had not done anything to cause Willard's [the driver of the motorcycle] high-speed driving in the first place, nothing to excuse his flouting of the commonly understood law enforcement authority to control traffic, and nothing (beyond a refusal to call off the chase) to encourage him to race through traffic at breakneck speed forcing other drivers out of their travel lanes. Willard's outrageous behavior was practically instantaneous, and so was Smith's with instinctive response. While prudence would have repressed the reaction, the officer's instinct was to do his job as a law enforcement officer, not to induce Willard's lawlessness, or to terrorize, cause harm, or kill. Prudence, that is, was subject to countervailing enforcement considerations, and while Smith exaggerated their demands, there is no reason to believe that they were tainted by an improper or malicious motive on his part.
>
> Regardless whether Smith's behavior offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, it does not shock

the conscience, and petitioners are not called upon to answer for it under § 1983. Id. at 855.

However, a closer reading of the opinion indicates that this Court considered, examined and endorsed the use of the lower standard of fault of "deliberate indifference" in some § 1983 claims. In detailing its decision to resort to the "shock the conscience" standard in such actions, this Court explained that it rejected the lowest standard of common law liability. Id. at 849 ("liability for negligently inflicted harm is categorically beneath the threshold of constitutional due process.") This Court based this determination on the axioms that "the Fourteenth Amendment is not a 'font of tort law to be superimposed upon whatever systems may already be administered by the States,' (*citing* Paul v. Davis, 424 U.S. 693, 701, 96 S.Ct. 1155, 116-1161, 47 L.Ed.2d 405 (1976)) and that "'[o]ur constitution deals with the large concerns of the governors and the governed, but it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.'" Lewis, 523 at 848-50.

This Court, rather, found that behavior at the higher end of the culpability spectrum "**most probably**" supports a substantive due process § 1983 claim — "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action "**most likely**" to rise to the conscious-shocking level." Id. 523 U.S. at 849 (emphasis added). More importantly, the Court then declared that whether the shock-the-conscience standard is met when injuries are produced by middle-range culpability — "'something more than negligence but less than intentional conduct, such as recklessness or gross negligence'" [internal citations omitted] — "is a matter for closer calls." The Court declared that it had expressly recognized the possibility that

such conduct can be egregious enough to state a substantive due process claim. Id. at 849-50.

To fully explain the range of cognizable claims between the high- and mid-level culpability standards in § 1983 claims, this Court examined actions of prison officials and then compared those to police officer's actions. The Court noted that deliberately indifferent conduct by prison officials to medical needs of a prisoner or for a pre-trial detainee was serious enough to constitute an actionable deprivation of due process rights. Id. 523 U.S. at 849-50 (in the custodial situation of a prison, forethought or deliberation about a prisoner's welfare is "not only feasible but obligatory. . . .") Then, highlighting that the rules of due process are not subject to "mechanical application in unfamiliar territory," the Court observed that deliberate indifference that shocks in one situation may not be so egregious in another setting. Id. at 850.

As an example, the Court demonstrated that even in a prison setting, prison officials' conduct during a riot would not rise to an actionable violation of the constitution unless force was applied not to restore discipline but maliciously and sadistically only to cause harm. Id. 523 U.S. at 851-53. Similarly, this Court reasoned, police faced with a situation calling for quick action have obligations that tug against each other: "Their duty is to restore and maintain lawful order, while not exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made 'in haste, under pressure, and frequently without the luxury of second chance.'" Id. at 853. Finally, the Court noted:

> "To recognize a substantive due process violation in these circumstances when only mid-level fault has been shown would be to forget that liability for deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the pulls of competing obligations. When such **extended opportunities to do better** are teamed with protracted failure even to care, indifference is truly shocking." Id. at 854 (emphasis added)

Accordingly, whether a § 1983 action calls for proof of specific intent to harm or the mid-level culpability standard of deliberate indifference, recklessness or gross negligence is a matter to be determined in light of all the facts surrounding the particular incident in question.

For example, three circuit courts of appeals in 1998 relied upon the holding in Lewis in upholding grants of summary judgment against decedents of innocent bystanders who had been shot and killed by law enforcement officials in various incidents and subsequently brought § 1983 claims against government officials, police officers, police departments and counties. See, Medeiros v. O'Connell, 150 F.3d 164 (2nd Cir. 1998); Schaefer v. Goch, 153 F.3d 793 (7th Cir. 1998); Moreland v. Las Vegas Metropolitan Police Dept., 159 F.3d 336 (9th Cir. 1998). It is important to note the particular facts of each of these cases which warranted applying the higher standard of culpability. In each case, the law enforcement officials were faced with exigent criminal circumstances which needed to be immediately quelled to protect the safety of the surrounding communities. In

Mederios, a man shot a car salesman, stole a vehicle, led police in a hot pursuit, abandoned the car and hijacked a bus with two teenagers aboard, and directed the bus driver to drive through a roadblock heading into a populated area before police opened fire, killing him and one of the teens. Mederios, 150 F.3d at 166-67. In Schaefer, a man with a known violent past and several brushes with the law threatened patrons in a bar, returned to his home and took his wife hostage in a standoff with the local sheriff's Special Response Team. In an attempt to save the wife, the SRT opened fire on the man as he came out of his house armed with a shotgun and tried to drag his wife by her hair back inside his home. Schaefer, 153 F.3d at 794. And in Moreland, officers attempted to quell a gunfight which occurred in a bar parking lot with 50 to 100 people caught in the crossfire of the fight. Moreland, 159 F.3d at 368. Moreover, none of the law enforcement officials in these cases created the actual situations which gave rise to the exigent, high-tension circumstances to which they were required to respond with speed to protect the safety of the general public.

Petitioners submit that the allegations set forth in Counts III -- X of their amended petition, which have to be accepted as true, state a § 1983 claim for relief for Peterson's violation of Neal's and his family's substantive due process rights. Petitioners additionally submit that they offered sufficient proof of the denial of Neal's and their substantive due process rights, thereby precluding the entry of summary judgment on Counts I and II. Unlike Lewis and the cases cited to above, this case qualifies for the application of the "deliberate indifference" standard, rather than the more exacting "purpose to cause harm" standard.

In affirming the district court's dismissal of Petitioners' claims and grant of summary judgment, the Eighth Circuit focused exclusively on Peterson's actions in the parking lot as he approached Neal and Baker behind the store, announced himself, drew his weapon and returned Baker's fire. Neal, et al. v. St. Louis County Bd. of Police Commissioners, 217 F.3d 955, 957 (8th Cir. 2000). In doing so, the court viewed the case as comparable to Lewis, as Peterson was forced to make a split-second decision as to how to handle the threat posed by Baker, who was pointing a gun at Neal's head and forcing him to the ground. Id. at 958-59. However, as pleaded by the Petitioners, these events did not occur in a vacuum.

Petitioners alleged that Neal died at approximately 4:00 p.m. on January 29, 1997, behind Mac's Liquor Store on Natural Bridge in the City of St. Louis after being struck by a bullet fired by Peterson in the course of an undercover drug buy. Neal and Peterson were not regular partners, and Neal often worked alone. The undercover operation was carried out without a supervisor present, without any pre-operational briefing and without Neal or Peterson being equipped with body microphones for the purpose of communication. Petitioners further alleged that Peterson had received no training for carrying out undercover narcotics operations and that he was unfit for such work as he had nearly been shot in the face one year earlier by a crime suspect and had not received a leave of absence or counseling for this incident.

Pursuant to the standard of determining whether a complaint should be dismissed under Rule 12(b)(6), relief could be granted to Petitioners under a set of facts that could be proved consistent with the allegations in its amended complaint. Respondents and Petitioners set forth such facts in

their motions for summary judgment and responses thereto. Though many of the facts are disputed, they essentially demonstrate that Peterson had ample time to actually deliberate his actions and his deliberate indifference to the safety and life of Neal was truly shocking, precluding the district court from entering its dismissal order and granting summary judgment to Respondents.

Both Neal and Peterson were officers within the BDE. Presumably, they had received copies of the BDE's policies and were familiar with their requirements, though even this fact was in dispute. Additionally, Neal worked in the undercover unit, carrying out drug buys and arrests. Peterson, however, worked in the special investigations unit, working on matters pertaining to vice, gambling and stolen property. Approximately an hour and a half before being shot and killed, Neal approached Peterson and asked him to operate as his cover for a proposed undercover drug buy. Peterson, with his supervisor's approval, agreed to do so. At the time that Peterson left with Neal, he did not know the identity of the suspect, as Neal had not told him nor had Peterson asked. Peterson also had not been debriefed regarding the operation, again because Neal had not told him and Peterson had not asked. Additionally, Neal and Peterson were not wired with sound and recording devices to monitor communications, they were not wearing bullet-proof vests and they were not accompanied by a supervisor. With all of these policy violations in his knowledge, Peterson still went along with Neal to carry out the operation. He did not object in any way to his lack of knowledge regarding the operation, he did not express any concerns about Neal's safety under these circumstances, he was not "ordered" to assist Neal, and he at no time attempted to abort the operation or decline Neal's request that he assist in the operation. As Neal was not

Peterson's supervisor, Peterson was in no way obligated to assist in the undercover drug buy.[5]

After Neal and Peterson arrived at the restaurant on Natural Bridge, Neal did not see the suspect. He then exited the car, made a phone call, got back in the car and told Peterson they were going to a nearby liquor store that the suspect frequented. Neal and Peterson sat in the car in the liquor store parking lot for approximately 45 minutes before being approached by Baker. During this time period Peterson could have: (1) inquired about the phone call and whether it was related to the undercover drug buy; (2) requested that they seek additional backup, the presence of a supervisor and the assistance of the St. Louis Metropolitan Police Department, pursuant to Bureau policies; (3) discussed with Neal a procedure to follow should there be any trouble in the transaction to insure both their safety and proper cover for Peterson; (4) inquired about the identity of the suspect and any other information Neal had concerning the operation; (5) discussed a better location of the vehicle and a course of procedure to insure that Peterson would not lose sight of Neal

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[5] The appellate court stated in its opinion, without any definitive factual support from the record before it, that "Peterson did not have the authority to order Neal" to either comport with Department and Unit policies or abort the operation and that "many of the alleged violations of department regulations were committed not by Peterson, but rather by Neal." Neal, 217 F.3d at 959, n. 2. There has never been a dispute that Neal himself violated many of the departments regulations. However, it is disingenuous to lay all such blame on a dead man who cannot answer such unwarranted and unsupported charges. Peterson had absolute authority, power and opportunity to abort the operation, as Neal was not his supervisor, despite his senior officer status.

and the suspect; and/or (6) called off the operation due to the numerous BDE policy violations that had already occurred.

The BDE policies emphasize time and again the importance of officer safety and insuring the safety of the undercover officer participating in a drug buy. Peterson had approximately 105 minutes to consider the safety of Neal, their failure to follow BDE policies and whether they should go forward with the operation under such circumstances. Unlike the law enforcement officials in Lewis, Medeiros, Moreland and Schaefer, Peterson had the luxury of having time to make unhurried judgments with a chance for repeated reflection on the dangers they were facing and could possibly face and whether they were properly and safely carrying out the undercover operation. However, given his lack of action and courage to speak up regarding their violations of policy and the dangers they created for Neal, Peterson was wholly indifferent to Neal's safety. "When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." Lewis, 523 U.S. at 853.

Unlike the law enforcement officials discussed in the cases *supra*, Peterson and Neal did not face exigent circumstances created by a third-party criminal. Peterson did not know who the suspect was or whether he was even a drug user or dealer. As such, they did not have the tug of competing obligations which the officer in Lewis faced. There was no unlawful disorder which they needed to rectify quickly, with no second chance to reflect on their actions. Rather, the operation was of their own creation. Regardless of the fact that Neal had set up the drug buy, Peterson agreed to participate in it and thus had every right and, indeed, an obligation, to inquire into every relevant facet thereof. By all accounts, he took no action to do so and as such did not

adequately perform the role of cover to Neal, protect his safety or even exhibit signs of caring about his safety until — through his own dereliction in letting the suspect completely out of his sight and Neal mostly out of his sight — it was too late. Certainly, therefore, Peterson's actions and inactions, the protracted opportunity he had to reflect on the operation and to perform his duties better and his apparent indifference to the safety of Neal's life constituted actionable deliberate indifference which resulted in the deprivation of Neal's and his family's substantive due process rights.

CONCLUSION

This case presents a question of exceptional importance — whether the actions of an officer when he has time to deliberate may reach the standard of deliberate indifference and thus give rise to a § 1983 cause of action or whether the court may only look at the exact instant when he pulls the trigger to see a purpose to cause harm in order to satisfy the element of conscience-shocking conduct necessary for a substantive due process violation. By granting Petitioners' petition for certiorari, this Court can correct the Eighth Circuit's decision, which defies this Court's holding that "when such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." Lewis, 523 U.S. at 853.

Accordingly, Petitioners respectfully request that their petition for writ of certiorari be granted.

Respectfully submitted,

/s/_____
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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed July 3, 2000]

No. 99-2938

Jennifer Neal, Personal Representative of the Estate of deceased Willie Neal, Jr.; Jennifer Neal, on her own behalf,
Appellants,

Willie Neal, Sr.; Jamelah Neal; Whitney Neal, by their next friend nfr Jennifer Neal, Plaintiffs,
Plaintiffs,

v.

St. Louis County Board of Police Commissioners; St. Louis County Police Department; Ronald Battelle, Chief of St. Louis County Police Department; Robert Flagg, Chairman; Gene Warmann, Vice Chairman; Patrick Pwardowski, Secretary; Sheila Hoffmeister, Member; Leon Burke, member, comprising the St. Louis County Board of Police Commissioners; Carl Peterson,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

Submitted April 12, 2000.

Before: WOLLMAN, Chief Judge, MAGILL, Circuit Judge, and FRANK,* District Judge.

OPINION

MAGILL, Circuit Judge.

This appeal requires us to decide whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by accidently shooting another officer while attempting to protect the other officer from an armed suspect. We answer no, and hold that in such circumstances only a purpose to cause harm to the threatened officer will satisfy the element of conscience-shocking conduct necessary for a due process violation.

I.

On January 29, 1997, Officer Willie Neal asked Officer Carleton Peterson to accompany him on an undercover operation that Neal had arranged for later that day. Peterson agreed to assist Neal, subject to the approval of Peterson's supervisor, Sergeant Bill Hines. After learning

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* THE HONORABLE DONOVAN W. FRANK, United States District Judge for the District of Minnesota, sitting by designation.

of the planned operation, Sergeant Hines asked Neal if he wanted additional backup officers to participate in the operation. Neal, the senior officer involved in the operation, refused the offer of additional backup.

Later that afternoon, Neal and Peterson drove to Mac's Package Liquor Store (Mac's), located at 5956 Natural Bridge Road in Saint Louis. Neal parked his car perpendicular to and facing the west wall of the building. Within minutes of arriving at Mac's, a person later identified as Jerome Baker approached the car from the passenger side and looked in the window at Peterson. Baker then walked around the car and headed towards Neal. Neal exited the vehicle and approached Baker. Baker shook Neal's hand and engaged Neal in conversation. As Baker and Neal talked, they walked to the southwest corner of Mac's building.

After observing Baker and Neal talk for a few moments, Peterson saw Neal raise his left hand in what he recognized as a sign of trouble. Peterson also realized that he could no longer see Baker, although Neal had never left his sight. Peterson got out of the undercover car and slowly moved to where he could see the southwest corner of the building. When he looked around the building's corner, he was surprised to see Baker pointing a pistol directly at Neal's head, jabbing the weapon in a hostile and threatening manner, and forcing Neal to lower himself to the ground.

Peterson announced he was a police officer and ordered Baker to drop his gun. Upon hearing Peterson's announcement, Baker whirled around and immediately started firing at Peterson. Peterson returned two shots at Baker in an attempt to defend himself and Neal. Baker continued to fire,

forcing Peterson to dodge to his left. Baker fled the scene before Peterson had the opportunity to fire any additional shots at the armed suspect.

Peterson noticed Neal was injured and assisted him back into the vehicle. Peterson then requested nearby witnesses to inform the police that Neal had been shot during the gunfight. When Emergency Medical Services personnel arrived at the scene, they examined Neal and declared him dead at 4:02 p.m. The Saint Louis Medical Examiner determined that Neal died due to a single bullet wound which entered the left side of his chest, traveled through both of his lungs and through his right arm. It was later determined that Peterson fired the bullet which struck and killed Neal. At the time of the shootout, Peterson did not realize that he had shot Neal. Moreover, he did not believe that Neal would be endangered by the shots he fired at Baker as Neal was lying on the ground.

On January 30, 1998, Neal's surviving family members initiated suit pursuant to 42 U.S.C. § 1983, alleging that Peterson violated Neal's Fourteenth Amendment substantive due process rights by not following departmental procedures during the undercover operation. Plaintiffs also named the County of Saint Louis, the Chief of the Saint Louis County Police Department, and Members of the Saint Louis County Board of Police Commissioners as defendants in this case, arguing that these defendants failed to train and supervise Peterson in the proper procedures for undercover operations, or otherwise maintained policies or customs which contributed to the accidental shooting of Neal.

The district court[1] dismissed plaintiffs' claims against Officer Peterson, finding that plaintiffs' allegation that Peterson acted with "deliberate indifference" towards Officer Neal did not state a Fourteenth Amendment substantive due process claim. Rather, given the circumstances of this case, the district court held that only a purpose to cause harm unrelated to the legitimate objective of making an arrest will satisfy the element of arbitrary conduct that shocks the conscience. The district court also dismissed plaintiffs' claims against Saint Louis County, the Chief of Police, and the police board members, finding that these defendants could not be held liable because Officer Peterson did not violate Officer Neal's constitutional rights. For reasons to be discussed, we affirm.

II.

Appellants first argue that the district court erred in holding an allegation of "deliberate indifference" or "recklessness" is insufficient to state a Fourteenth Amendment due process claim based on an officer's accidental shooting of a fellow officer during a shootout with an armed suspect. We reject appellants' argument.

The Supreme Court has recognized that the Fourteenth Amendment's provision that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law," U.S. Const. amend. XIV, § 1, "guarantees more than fair process," Washington v. Glucksberg, 521 U.S. 702, 719,

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[1] The Honorable Rodney W. Sippel, United States District Judge for the Eastern District of Missouri.

117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), and covers a substantive sphere as well, "barring certain government actions regardless of the fairness of the procedures used to implement them," Daniels v. Williams, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986). The allegation in this case amounts to such a claim. Plaintiffs essentially allege that Peterson's actions in causing Neal's death were an abuse of executive power so clearly unjustified as to be barred by the Fourteenth Amendment. Whether Peterson's actions were such an abuse of power turns on whether Peterson's actions towards Neal shocks the conscience in such a way as to violate the rights protected by the Fourteenth Amendment. See County of Sacramento v. Lewis, 523 U.S. 833, 844-56, 118 S.Ct. 1708, 1716-21, 140 L.Ed.2d 1043 (1998).

In situations where a state actor is afforded a reasonable opportunity to deliberate various alternatives prior to electing a course of action, the chosen action will be deemed "conscience shocking" if the action was taken with "deliberate indifference." See Lewis, 523 U.S. at 850-51, 118 S.Ct. at 1719. However, in rapidly evolving, fluid, and dangerous situations which preclude the luxury of calm and reflective deliberation, a state actor's action will shock the conscience only if the actor intended to cause harm. See id. at 853, 118 S.Ct. at 1720. In the latter situations, as a practical matter, state actors do not have time to engage in actual deliberation. Thus, in these types of situations, the Supreme Court has recognized that liability "turn[s] on whether force was applied in a good faith effort . . . or maliciously and sadistically for the very purpose of causing harm." Id. (holding that an officer's high-speed chase with no intent to harm suspects physically or worsen their legal plight

does not give rise to liability under the Fourteenth Amendment) (internal citation omitted).

Relying on Lewis, the district court held that plaintiffs' allegations of Peterson's "deliberate indifference" were insufficient to state a cause of action under the Fourteenth Amendment because only a purpose to cause harm unrelated to law enforcement objectives will "shock the conscience" in cases requiring officers to exercise quick judgment in a dangerous and rapidly evolving situation. The district court found that Officer Peterson did not have time to deliberate about his actions, but, rather, responded quickly and decisively to protect Officer Neal from a criminal suspect who was pointing a gun in a threatening manner at Neal's head. According to the district court, Officer Peterson did not have the luxuries of time and opportunity to deliberate and weigh competing interests before acting to protect Officer Neal from danger. We agree. Thus, unless Peterson acted "maliciously and sadistically for the very purpose of causing harm," his accidental shooting of Neal did not violate Neal's Fourteenth Amendment rights. See Lewis, 523 U.S. at 853, 118 S.Ct. at 1720. Plaintiffs admit that Peterson accidentally shot Neal in an attempt to protect Neal from harm. Therefore, the district court properly dismissed their claims based on Officer Peterson's "deliberate indifference" to Officer Neal's welfare.

Plaintiffs attempt to redirect this Court's focus to the hour and a half before the shootout to show that Officer Peterson had time to deliberate departmental policies and practices designed to protect officers involved in undercover operations. More specifically, plaintiffs argue that Peterson was deliberately indifferent to the following policies and practices which might have saved Neal's life: 1) pre-

transaction planning or briefing, 2) use of authorized ammunition, 3) keeping fellow officers in sight during the undercover operation, 4) use of wires to record and monitor conversations between fellow officers and suspects, 5) use of additional officers to provide backup, and 6) use of a bulletproof vest. Plaintiffs suggest that the "deliberately indifferent" standard, rather than the "malicious or sadistic" standard, should be used because Peterson had time to consider these policies and deliberately chose to disregard them at a time when both Neal and he were free from danger. We reject plaintiffs' argument.

Given the facts of this case, we believe that it is inappropriate to look outside the time period immediately preceding Peterson's decision to fire his gun to determine whether Peterson's conduct was truly conscience shocking. More specifically, we refuse to consider violations of departmental guidelines allegedly committed approximately one and a half hours before the shootout between Baker and Peterson. Police department guidelines and policies do not create constitutional rights under the substantive due process clause of the Fourteenth Amendment. See Edwards v. Baer, 863 F.2d 606, 608 (8th Cir.1989); see also Lewis, 523 U.S. at 855, 118 S.Ct. at 1721 (holding that "[r]egardless whether [defendant's] behavior offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, it does not shock the conscience, and [defendant's] are not called upon to answer for it under § 1983."); Claybrook v. Birchwell, 199 F.3d 350, 360 (6th Cir.2000) (holding that even if the actions of the three defendant patrolmen violated departmental policy or were otherwise negligent, no rational fact finder could conclude that those peace enforcement operatives acted with conscience

shocking malice or sadism towards the unintended shooting victim). Thus, even assuming we look beyond the immediate circumstances of the shooting, plaintiffs could not sustain their due process claim because of Peterson's alleged indifference to departmental policies and regulations.[2]

III.

Because Peterson did not violate Neal's Fourteenth Amendment rights, the County and City Official defendants cannot be held liable for a failure to train or supervise Officer Peterson. See Brodnicki v. City of Omaha, 75 F.3d 1261, 1266 (8th Cir. 1996) (holding that a city cannot be held liable under an inadequate training or municipal custom theory unless the defendant police officer is found liable on the underlying substantive claim). Thus, we affirm the district court's dismissal of plaintiffs' claims against Saint Louis County, the Chief of Police and the Police Commissioners.

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[2] We note that Neal, the senior officer involved in the undercover operation that gave rise to the instant case, had the discretion to terminate the operation at any time, as well as the discretion to use a wire or a bullet proof vest. Neal decided to continue the operation without the use of either device, possibly to prevent alerting a suspect to his true identity in the event of a pat down. Officer Peterson did not have the authority to order Neal to do otherwise. Moreover, it was Neal who refused Sergeant Hines's offer to provide additional police officers for the mission. Thus, many of the alleged violations of departmental regulations were committed not by Peterson, but rather by Neal.

IV.

A police officer does not violate Neal's substantive due process rights by acting "deliberately indifferent" in accidently shooting another officer while attempting to protect the other officer from an armed suspect who was holding a gun to the head of the other officer. Rather, in such circumstances, only a purpose to cause harm to the threatened officer is sufficiently conscience shocking to give rise to a Fourteenth Amendment violation. Thus, the district court properly dismissed plaintiffs' claims in their entirety. For reasons discussed, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[Dated July 3, 2000]
[Filed August 22, 2000]
No. 99-2938

Jennifer Neal, Personal Representative of the Estate of deceased Willie Neal, Jr.; Jennifer Neal, on her own behalf,	)
Appellants,	)
	)
Willie Neal, Sr.; Jamelah Neal; Whitney Neal, by their next friend nfr Jennifer Neal, Plaintiffs,	)
Plaintiffs,	)
v.	)
	)
St. Louis County Board of Police Commissioners; St. Louis County Police Department; Ronald Battelle, Chief of St. Louis County Police Department; Robert Flagg, Chairman; Gene Warmann, Vice Chairman; Patrick Pwardowski, Secretary; Sheila Hoffmeister, Member; Leon Burke, member, comprising the St. Louis County Board of Police Commissioners; Carl Peterson,	)
Appellees.	)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgement of the district court in this cause is affirmed in accordance with the opinion of this Court.

(5172-010199)

July 3, 2000

A true copy.

ATTEST: /s/_____
CLERK, U.S. COURT OF APPEALS
EIGHTH CIRCUIT.

MANDATE ISSUED
AUG 22 2000

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed August 10, 2000]

No. 99-2938

Jennifer Neal, et al.,	)
Appellants,	)
	)
v.	)
	)
St. Louis County Board of Police Commissioners, et al.,	)
Appellees.	)
	)

Appeal from the United States District Court
for the Eastern District of Missouri

The petition for rehearing by the panel filed by appellants is denied.

(5193-010199)

August 10, 2000

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit